

BRB Nos. 11-0481
and 11-0481A

HEIDI EBERLY-SHERMAN)	
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	
DEPARTMENT OF ARMY/NAF)	DATE ISSUED: 03/05/2012
)	
Self-Insured)	
Employer-Petitioner)	
Cross-Respondent)	DECISION and ORDER

Appeals of the Order on Attorney's Fees and the Reconsideration of Attorney's Fee Order of R. Todd Bruininks, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott, P.C.), Seattle, Washington, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Order on Attorney's Fees and the Reconsideration of Attorney's Fee Order (OWCP No. 14-134194) of District Director R. Todd Bruininks rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless it is shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Following a settlement under 33 U.S.C. §908(i) between the parties in this case, claimant's counsel filed fee petitions with both the district director and the administrative law judge for work performed before those respective offices.¹ In an Order issued on February 5, 2008, District Director Karen P. Staats addressed claimant's counsel's application for an attorney's fee in the amount of \$937.50 for work performed before her, representing 2.5 hours of work at an hourly rate of \$375. She found that the evidence supported an hourly rate of \$235, and she approved 1.75 hours of attorney time for a total fee of \$411.25. *Id.* at 2-3. Claimant appealed, and the Board held that the district director erred in relying exclusively on contemporaneous longshore cases to set the hourly rate and improperly reduced the rate due to the lack of complexity of the issues. *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41 (2009). Consequently, the Board vacated the district director's fee award and remanded the case for further consideration consistent with *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), and *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). *Sherman*, 43 BRBS at 44. In light of District Director Staats's retirement, District Director Bruininks received the case on remand.

While the case was pending before District Director Bruininks (the district director), in September 2009, counsel requested an additional fee for 12 hours of attorney time at a rate of \$400 per hour and 5.75 hours of legal assistant time at a rate of \$150 per hour. The district director determined that, because the fee request included services provided by claimant's counsel between 2006 and 2009, and the Board already had addressed the relevant community and prevailing market rate to be applied for counsel's services between 2007 and 2010 in *Christensen v. Stevedoring Services of America [Christensen I]*, 43 BRBS 145 (2009), *modified on recon. [Christensen II]*, 44 BRBS 39, *recon. denied [Christensen III]*, 44 BRBS 75 (2010), he need not make new findings regarding the hourly rate to be awarded to claimant's counsel for work performed in 2007, 2008, or 2009.² Using the 2007 rate awarded in *Christensen* as a base, the district

¹Only the district director's fee award is before the Board at this time. *But see Eberly-Sherman v. Dept. of Army/NAF*, BRB No. 10-0365 (Nov. 10, 2010); *Eberly-Sherman v. Dept. of Army/NAF*, BRB No. 10-0387 (Oct. 5, 2010). The Board's October 5, 2010, decision is on appeal to the Ninth Circuit.

²In its orders in *Christensen*, the Board set Portland, Oregon, as the relevant community for claimant's counsel. In determining counsel's hourly rates, the Board used \$350, the 95th percentile rates from the 2007 Oregon Bar Survey for general plaintiff civil litigation, both personal injury and non-personal injury for 2006, as a base rate and adjusted for cost-of-living increases based on the percentage increase provided on the Federal Locality Tables for Portland. *Christensen II*, 44 BRBS 39; *Christensen I*, 43 BRBS 145. The Board awarded the following hourly rates to claimant's counsel: (2007) \$357.50; (2008) \$370; (2009) \$384; (2010) \$392. The Board's orders subsequently were

director calculated counsel's hourly rate for 2006 to be \$349 by adjusting for the cost-of-living increase provided on the Federal Locality Tables for Portland, Oregon. Based on the hourly rates awarded by the Board in *Christensen II*, 44 BRBS 39, for 2007 through 2009, as well as on his calculated rate for 2006, the district director awarded counsel a total attorney's fee of \$4,696.80.³ Employer filed a motion for reconsideration, which the district director denied.

Employer appeals, and claimant cross-appeals, the district director's fee award. Employer challenges the hourly rates awarded to claimant's counsel, and claimant challenges the district director's failure to enhance the fee to account for the delay in the payment of his requested fee.

Employer contends that the district director erred in failing to consider the quality of counsel's representation in this specific case. Employer asserts that the district director erred in awarding an hourly rate based on the top five percent of hourly rates for plaintiff civil litigation attorneys, as the Board did in *Christensen*, because counsel's representation in this case did not warrant the exceptional rate reserved for the top five percent of attorneys. Employer avers that the 25th percentile rate from the Oregon Bar Survey should be used instead and offers as support the administrative law judge's assessment of counsel's representation as "sufficient, but not exceptional," and District Director Staat's statement that counsel did not perform any "novel, complicated, or difficult legal activity." See *Eberly-Sherman v. Dept. of Army/NAF*, Case No. 2007-LHC-0231, slip op. at 8 (Nov. 5, 2009); *Eberly-Sherman v. Dept. of Army/NAF*, OWCP No. 14-134194, slip op. at 2 (Feb. 5, 2008).

The United States Court of Appeals for the Ninth Circuit does not require a new determination of the relevant community and market hourly rate to be made in every case.⁴ *Christensen*, 557 F.3d at 1051, 43 BRBS at 9(CRT). In its decision in

affirmed by the Ninth Circuit. *Stevedoring Services of America v. Director, OWCP*, No. 10-73574, 2011 WL 326769 (9th Cir. Aug. 1, 2011).

³This fee represents \$3,951.50 in attorney's fees and \$745.30 in legal assistant fees. The breakdown for attorney services is as follows: \$349 per hour for 1.25 hours in 2006 (\$436.25), \$357.50 per hour for 2.5 hours in 2007 (\$893.75), \$370 per hour for 4.75 hours in 2008 (\$1,757.50), and \$384 per hour for 2.25 hours in 2009 (\$864). The breakdown for legal assistant services is: \$134.79 per hour for 1.5 hours in 2007 (\$202.19) and \$144.83 per hour for 3.75 hours in 2008 (\$543.11).

⁴The court stated, "Nor do we insist that in every fee award decision the BRB must make new determinations of the relevant community and the reasonable hourly rates," so

Christensen, the Board averaged the 2006 hourly rates from the 2007 Oregon Bar Survey for general plaintiff civil litigation attorneys as the basis for counsel's market rate. The Board used the rates reported at the 95th percentile, due to counsel's 40 years of experience. *Christensen II*, 44 BRBS 39. Although an attorney's hourly rates and quality of representation can vary from case to case and, within one case, from level to level, see *B&G Mining, Inc., v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6th Cir. 2008), if an attorney is very experienced and skilled, a higher hourly rate for fewer hours is reasonably warranted.⁵ In this case, claimant was successful in obtaining benefits, and the district director, who considered the factors in 20 C.F.R. §702.132, determined that it was reasonable to use the hourly rates calculated by the Board for the work performed during the corresponding years. Contrary to employer's assertion, the district director properly addressed the novelty and difficulty of the issues involved in considering the number of compensable hours and not in addressing the hourly rate. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). Employer has not shown that the district director abused his discretion in awarding a fee based on the identified hourly rates and his hourly rate determinations therefore are affirmed.⁶

long as fee awards are based on current, rather than historical, market conditions. *Christensen*, 557 F.3d at 1051, 43 BRBS at 9(CRT).

⁵In *B&G Mining*, the Sixth Circuit observed the following:

It should be emphasized that “the market” for legal counsel is not a commodity market with a single price, but rather a service market with various price points based on education, experience, specialty, complexity, etc. By looking, for example, to the level of experience, an adjudicator could reasonably conclude that a more experienced attorney would command a higher market rate than a less seasoned one, *ceteris paribus*. That a less experienced attorney might command a rate of \$150/hour and a more experienced attorney might command a rate of \$300/hour would not offend the sensibilities of a reasonable client. Thus, an adjudicator might need to consider one or more of the “reflected” factors to determine where the particular attorney's representation lies along the spectrum of the market for legal services. This and other courts have routinely referred to factors like experience and complexity in justifying a particular lodestar rate.

522 F.3d at 665, 42 BRBS at 29(CRT).

⁶For the reasons set forth in *Christensen v. Stevedoring Services of America*, 44 BRBS 75 (2010), we reject employer's assertion that the Board erred in excluding workers' compensation rates from the hourly rate calculation based on an erroneous

Claimant, on cross-appeal, contends the district director erred in not compensating counsel for the delay in the payment of his requested fee. *See generally Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999); *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998). Counsel did not seek an enhanced fee before the district director. Consequently, we decline to address this issue, as it is being raised for the first time on appeal. *See Van Skike*, 557 F.3d 1041, 1048-49, 43 BRBS 11, 15-16(CRT); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996)(enhancement for delay not appropriate when delay is due to appeal of the fee award).

Accordingly, the district director's Order on Attorney's Fees and the Reconsideration of Attorney's Fee Order are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

interpretation of the Oregon state worker's compensation statute. We also reject employer's assertion that claimant failed to establish that insurance defense attorneys have lower hourly rates due to the volume discounts they offer insurance companies in exchange for the quantity work. *Id.*; *see also B&G Mining*, 522 F.3d 657, 42 BRBS 25(CRT).